No. 72-1470

IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

BOB JONES UNIVERSITY,

Petitioner,

v.

JOHN B. CONNALLY, Secretary of the Treasury of The United States, and JOHNNIE M. WALTERS, Commissioner of Internal Revenue

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Bob Jones University, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the proceedings on January 19, 1973.

OPINION BELOW

The Opinion of the Court of Appeals for the Fourth Circuit has not yet been reported. It is reproduced in Appendix A to this Petition.

The Opinion of the District Court for the District of South Carolina is reported at 341 F.Supp. 277 and is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A *infra* Page A-1) was entered on January 19, 1973. A timely Petition for Rehearing was denied on March 21, 1973 (Appendix A *infra* Page A-10). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The Petitioner initiated this action seeking injunctive relief preventing the Commissioner of Internal Revenue from revoking its tax exempt status solely because of its admissions policy, an expression of its religious beliefs. The first basic question is whether the District Court had jurisdiction to grant the relief sought, specifically:

1. Whether the Anti-injunction Statute, 26 U.S.C. § 7421 or the exception in the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, deprives the Federal Courts of jurisdiction to enjoin the Commissioner of Internal Revenue where: (a) The action sought to be enjoined would result in irreparable injury to Petitioner; (b) Petitioner has no remedy at law and (c) Petitioner has asserted substantial statutory and constitutional questions concerning the legality of the Commissioner's threatened action.

2. Whether the Anti-injunction Statute, 26 U.S.C. § 7421, or the exception in the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 is unconstitutional as applied by the Court of Appeals for the Fourth Circuit in that it would deprive Petitioner of Fifth Amendment due process rights to be heard by an impartial tribunal prior to the infliction of concededly irreparable harm for which there is no remedy at law.

3. Whether the Court of Appeals for the Fourth Circuit misapplied the exception to the application of the Anti-injunction Statute enunciated by this Court in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962) and *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 52 S.Ct. 260, 76 L. Ed. 422 (1932).

4. Whether this case involves a suit to restrain the assessment or collection of a tax so as to trigger the provisions of the Anti-injunction Statute, 26 U.S.C. § 7421.

5. Whether the Federal Courts have inherent jurisdiction under the Constitution to grant injunctive relief against the Commissioner of Internal Revenue where Petitioner has made a showing of irreparable injury and a *prima facie* showing of illegal and unconstitutional threatened action sought to be enjoined.

The second basic question is whether the revocation of the Petitioner's tax exempt status solely because of its religious beliefs as expressed in its admissions policy is illegal or unconstitutional, specifically:

1. Whether the action threatened is unlawful and contrary to the clear and unambiguous provisions of the Internal Revenue Code.

2. Whether the action is illegal and beyond the delegated powers of the Commissioner of Internal Revenue.

3. Whether the action threatened is in violation of the First Amendment to the Constitution in that it would deprive the University of its right to the free exercise of its religious beliefs and would promote, benefit and establish religion.

4. Whether the threatened action is in violation of the Fifth Amendment to the Constitution in that it would deny the University due process and equal protection of the law.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Article I, Section 1 of the Constitution of the United States provides in pertinent part as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States. . . ."

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law respecting an establishment

of religion, or prohibiting the free exercise thereof; . . . or the right of the people peacefully to assemble. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

Section 501 of the Internal Revenue Code, 26 U.S.C. § 501 provides in pertinent part as follows:

"(a) Exemption from taxation. — An organization described in sub-section (c) . . . shall be exempt from taxation under this subtitle. . . .

• • •

(c) List of exempt organizations. — The following organizations are referred to in sub-section (a):

• • •

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, . . . or educational purposes. . . ."

Section 170 of the Internal Revenue Code, 26 U.S.C. § 170 provides in pertinent part as follows:

"(a) Allowance of deduction. —

(1) General Rule. — There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

• • •

(c) Charitable Contribution defined. —

For purposes of this Section, the term 'charitable contribution' means a contribution or gift to or for the use of—

(2) A corporation, trust or community chest, fund, or foundation —

• • •

(B) Organized and operated exclusively for religious, charitable . . . or educational purposes. . . ."

Section 7421 of the Internal Revenue Code, 26 U.S.C. § 7421 provides in pertinent part as follows:

"(a) Tax.— . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is a person against whom such tax was assessed."

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides in pertinent part as follows:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

28 U.S.C. § 1331 provides as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and cost, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C. § 1340 provides in pertinent part as follows:

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. . . ."

28 U.S.C. § 1361 provides as follows:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Internal Revenue Regulation, Section 1.501(c) (3) – 1, 26 C.F.R. 1.501(c) (3) provides in pertinent part as follows:

"(d) *Exempt purposes* – (1) *In General.* (i) an organization may be exempt as an organization defined in Section 501(c) (3) if it is organized and operated exclusively for one or more of the following purposes:

(a) religious, . . .

(f) educational, . . .

(3) *Educational defined* – (i) *In general.* The term "educational" as used in Section 501(c) (3), relates to –

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities: or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates the particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) *Examples of Educational Organization.* The following are examples of organizations which, if they otherwise meet the requirements of this section are educational:

Example (1). An organization such as a primary or secondary school, a college, or a professional or trade school which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on."

STATEMENT OF CASE

The Petitioner, Bob Jones University, is an eleemosynary corporation chartered in South Carolina, which carries on religious and educational activities in Greenville, South Carolina, enrolling 4,500 students at the college level and employing a faculty and staff of 650. It is a fundamentalistic religious school whose educational activities are permeated with its religious beliefs and practices. For example: all University activities including classroom instruction are begun and ended with prayer; *the University refuses to accept funds or grants from any government, federal, state or local, because it believes such acceptance would cause the surrender of its religious principles, and infringe upon its right to operate the school in harmony with such principles.* Among its deep religious convictions is the belief that the Bible forbids the intermarriage of the races. The University has exercised this religious belief since its inception in 1929 by denying admission to Negroes and providing for expulsion of students who date members of any race other than their own. It has maintained tax exempt status under 26 U.S.C. § 501(c) (3) since its inception during which period neither its religious beliefs as expressed in its admissions policy nor the applicable provisions of the Internal Revenue Code has changed.

In the summer of 1970, the Commissioner of Internal Revenue issued press releases stating that schools with discriminatory admissions policies, including religious schools such as the University, would have their tax exempt status revoked and advanced assurance of deductibility of contributions withdrawn. In response to this action the University filed suit against the Commissioner of Internal Revenue and the Secretary of the Treasury requesting temporary and permanent injunctive relief to restrain the government from revoking its tax exempt status solely because of its religious beliefs and practices as expressed in its admissions policy. Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1340 and 1361 and under the inherent jurisdiction conferred by the Constitution of the United States.

The United States District Court for the District of South Carolina assumed jurisdiction and granted the University a temporary injunction and refused the Government's Motion to Dismiss (Appendix B, page A-22), upon its finding that:

> The conclusion is inescapable that the primary purpose of the Defendants in threatening the revocation of the Plaintiff's tax exempt status is not to assess and collect taxes, but to compel through the use or threat to use taxing powers to require private educational and religious institutions to comply with certain political or social guidelines with regard to the question of racial integration. (Appendix B, page A-20)

And upon its further findings that University would suffer irreparable damage through loss of contributions if the Defendants were not enjoined and that the Defendants had surpassed or were in the process of surpassing their statutory authority.

With Senior Circuit Judge Boreman dissenting, the Court of Appeals reversed, holding that although the University would suffer irreparable injury if the Government were not enjoined, the Anti-injunction Statute, 26 U.S.C. § 7421, deprived the Court of Jurisdiction. A timely Petition for Rehearing in Banc was made on February 5, 1973, and denied by a divided court on March 21, 1973. The University applied for a stay of mandate in order to seek a review of the matter in this Court which was denied by the Court of Appeals on March 26, 1973, Judge Boreman dissenting. On March 28, 1973, an Application for a Stay of Mandate was made to the Chief Justice of this Court which was denied on April 3, 1973.

REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit Court of Appeals renders ineffective the exceptions to Anti-junction Statute enunciated by this Court in *Enochs v. Williams Packing Company*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962) and *Miller v. Standard Nut Margarine Company*, 284 U.S. 498, 52 S. Ct. 260, 76 L.Ed. 422 (1932) and would effectively deprive

the Federal Courts of power to restrain illegal and unconstitutional action of Federal taxing authorities where the assessment and collection of taxes is only remotely involved. It would give life to Mr. Chief Justice Marshall's observation "The power to tax involves the power to destroy." The *Williams Packing* test as applied by the Fourth Circuit here raises serious Fifth Amendment due process questions. The Internal Revenue Code makes no mention of admissions policies as a criteria for exempt status and only provides that *bona fide* educational institutions shall be exempt. By imposing additional requirements for exempt status, Treasury officials are attempting to exercise power and authority not delegated them by Congress. Furthermore, the University has asserted fundamental constitutional issues relating both to the question of jurisdiction and the merits which require this Court's attention. Finally, the case is in direct conflict with the Court of Appeals for the District of Columbia Circuit in *Americans United v. Walters*, No. 71-1299, decided January 11, 1973, (not yet reported, it is reproduced in Appendix C to this Petition).

The University contends that tax invoked here is nothing but a tax or penalty on its religious beliefs and practices and does not involve a *bona fide* attempt to add to the revenues of the United States. As stated by this Court in *Williams Packing*, *supra*:

> The manifest purpose of Section 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner, the United States is assured of prompt collection of its lawful revenue *Id.* at 7.

Here there are no "disputed sums" involved and the University's loss of contributions can never be determined in "a suit for refund." Surely Congress did not intend the taxing statute to be used in a manner to assure the "prompt collection" of forfeited religious beliefs and practices guaranteed by the First Amendment to the Constitution. By enacting the Anti-

injunction Statute, Congress did not intend to unleash the Federal Taxing Authority and enable them to force otherwise illegal and unconstitutional measures upon the citizenry.

The action threatened by the Government would first result in withdrawal of advance assurance of deductibility of contributions, then revocation of tax-exempt status ultimately leading to assessment and collection procedures. Even if advanced assurance and tax exempt status were withdrawn simultaneously and suit immediately filed in either the District Court or the Tax Court, the University would suffer irreparable harm in that individuals who would otherwise contribute to the University would either curtail their donations or divert their donations to other schools and religions enjoying the blessings of Internal Revenue Service granted advance assurance of deductibility of contributions and tax-exempt status. The most rapid progress in such litigation would result in a substantial contribution drought before the University's position could ultimately be vindicated. The loss of these contributions could never be recovered. In view of the time required by complex litigation involving substantial constitutional questions, this loss could well prove fatal.

The tax the government seeks to impose may be paid in other than legal tender; payment may be accomplished by relinquishment of religious beliefs and practices. All the University need do is to change its admissions policy in violation of its beliefs and the government is satiated. However, if the government has its way and if the University does not yield, it will be irreparably harmed because of its refusal to relinquish religious beliefs and practices, all without judicial scrutiny. The crux of the University's insistence that the Anti-injunction Statute is inapplicable rests upon the undisputed fact that no tax would be payable, indeed, there would be no controversy if the University changed its religious beliefs and practices.

The Fourth Circuit's application of the *Williams Packing* test would subject the University to the mercy of the Com-

missioner of Internal Revenue, an official charged with the collection of taxes and an advocate of the Service's policy on school admissions policies. Such is clearly violative of the due process clause of the Fifth Amendment. It is well settled that due process requires a hearing before an impartial tribunal before the imposition of sanction so harsh as to result in irreparable injury. *Wisconsin v. Constantieau*, 400 U. S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515 (1971). Due process requirements are applicable to the taxing powers of the Federal Government, *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 272 (1932). The opportunity to be heard ". . . must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manyo*, 380 U.S. 545, 552; 85 S.Ct. 1187, 1191 (1965). The tribunal must be impartial. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972).

When fundamental freedoms guaranteed by the Constitution are placed in imminent jeopardy by actions of Federal officers operating in their official capacity, the Federal judiciary has inherent jurisdiction to give substance to these Constitutional guarantees through exercise of its general equity power. This Court has recognized on many occasions the existence of such judicial authority. *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882); *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457, 93 L.Ed. 1682 (1949), *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, (1971). The power to enjoin unconstitutional action when clothed in a taxing statute has been specifically exercised in the face of the Anti-injunction Statute defenses. *Hill v. Wallace*, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922). "Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its Courts standing powerless to prevent a clear transgression by the government of the constitutional right of a person with standing to assert it." *Bivens v. Six Unknown Named Agents*, 409 F.2d 718, 723, (1969).

Applicable Sections of the Internal Revenue Code are clear and unambiguous commanding exempt status for the University. 501(a) states that the organizations described "shall" be exempt. 501(c)(3) states that organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes . . ." are those granted exemption under 501(a). There is no reference in the Internal Revenue Code to admissions policies of private universities. The University here clearly is an organization mandated as exempt by the Internal Revenue Code.

The Internal Revenue Service has consistently since at least 1942 applied these provisions to the University and granted it exempt status. There has been no change in the Internal Revenue Code and no change in the University's admissions policies during its more than 40 years of existence.

The Secretary of the Treasury and the Commissioner of Internal Revenue are delegated the authority to interpret and enforce the Internal Revenue Code as passed by Congress. They have no authority to make law. However, they attempt to twist and distort clear and unambiguous statutory provisions which have been repeatedly re-enacted by Congress at times when the University enjoyed exempt status. By this action they are attempting to usurp the Legislative power of the Federal Government delegated by the Constitution to the Congress of the United States.

The reliance of the Government and the court below upon the decision in *Green v. Connally*, 330 F.Supp. 1150 (D. D.C. 1971), *aff'd per curiam sub nom. Ciot v. Green*, 404 U.S. 997, 92 S. Ct. 564 (1971), is misplaced. On the jurisdictional issue, the *Green* case is consistent with the University's position here. Moreover the substantive issues raised by the University were not involved in *Green* and the *Green* court specifically refused to consider the ramifications of the injection of First Amendment rights into that case. In connection with these rights, the *Green* court recognized that religious freedoms may be involved.

> The special constitutional provisions insuring freedom of religion also insure freedom of religious schools, with policies restricted in furtherance of religious purpose. . . . We are not called upon to consider the hypothetical inquiry whether tax exemption or tax deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion. 330 F.Supp. at 1169.

The *Green* decision has no application in the context of *Williams Packing* where the *Green* court itself specifically refused to entertain the constitutional questions asserted by the University.

The Constitutional questions raised by the University are substantial and deserve this Court's attention. In essence, the Government seeks to tax the University and to divert contributions because of its religious beliefs. Such is clearly in violation of the First Amendment to the Constitution of the United States. This Court has consistently held that First Amendment rights may not be taxed. Furthermore, "When Government denies a tax exemption because of a citizen's belief, it penalizes that belief." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The case here is strikingly similar to that in *First Unitarian Church v. County of Los Angeles*, 357 U.S. 513, 78 S.Ct. 1352, 2 L.Ed. 2d 1460 (1948), where Mr. Justice Black stated:

> California, in effect had imposed a tax upon belief and expression. In my view, a levy of this nature is wholly out of place in this country; so far as I know, such a thing has never been attempted before. I believe it constitutes a palpable violation of the First Amendment. . . . The mere fact that California attempts to exact this ill-concealed penalty from individuals and churches and that its validity has to be considered in this Court, only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment.

The University respectfully submits that the government is now attempting the very thing so soundly condemned by Mr. Justice Black in *First Unitarian Church*. The practical effect of the Decision of the Fourth Circuit is to allow Treasury officials to tax the University because of its religious beliefs.

The "Benevolent Neutrality" Doctrine enunciated by Mr. Chief Justice Burger in *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697 (1970), is being ignored by Treasury officials. Not only do they seek to tax the University, with consequential entanglement in its affairs, but also their attack is selective – penalizing those who adhere to the University's beliefs and favoring others. Such a policy clashes with long established concepts of due process and equal protection.

The Senior Circuit Judge in his dissent below concisely states the University's situation:

> Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionally mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University. To permit such threatened action in these circumstances without affording the University a right to judicial consideration would tend to demonstrate that the age old phrase – *"The power to tax is the power to destroy"* – is literally true.

Appendix A at A-9.

The crack in the Constitutional protections opened by the Government action here has tremendous potential. If the Government is shielded from effective and meaningful judicial scrutiny by the Tax Statutes, it can disregard the Constitution. The very purpose of the Constitution to impose restraints upon government and guarantee freedoms to the people would be substantially handicapped, if not destroyed, if Treasury officials can demand tribute for the exercise of those freedoms.

Furthermore, the decision of the Fourth Circuit in the instant case is directly in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Americans United v. Walters*, (Appendix C, *infra*). The District of Columbia Court referred to the jurisdictional arguments advanced by the Government in this case as "identical" to those rejected in *Americans United*. Appendix C, page A-35. While the Fourth Circuit held that the Anti-injunction Statute, 26 U.S.C. § 7421 (a), deprived the Court of jurisdiction, the D.C. Circuit reversed and remanded with instruction to assume jurisdiction where the Government asserted identical anti-injunction defenses.

In its Opinion denying the University's Petition for Rehearing, the Fourth Circuit states it sees no conflict between *Americans United* and this case. The Court below attempts to distinguish the cases upon the basis that in no event would Americans United be required to pay taxes on its own income due to its qualification under 26 U.S.C. § 501(c) (4). Admittedly, the University cannot qualify under 26 U.S.C. § 501(c) (4) but the crux of the action sought to be enjoined here, the loss of advance assurance of deductibility of contributions and the diversion of contributors themselves is exactly the same as in *Americans United*. It is this action on the part of Treasury officials which results in irreparable injury for which there is no remedy. The Fourth Circuit simply asserts a distinction without a difference. Not only do the Fourth and District of Columbia Circuits disagree on the application of the Anti-injunction Statute (26 U.S.C. § 7421), they disagree over the disagreement.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals raises substantial questions relating to statutory and constitutional limitations upon federal taxing powers. This court should give meaning to the statement of Mr. Justice

Oliver Wendell Holmes: "The power to tax is not the power to destroy while this Court sits"* by granting this Petition.

Respectfully Submitted,

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**Panhandle Oil Co. v. State of Mississippi*, 277 U. S. 218, 223; 48 S. Ct. 451, 453.

Appendix A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 72-1075

BOB JONES UNIVERSITY,

Appellee,

v.

JOHN B. CONNALLY, Secretary of the Treasury of the United States and JOHNNIE M. WALTERS, Commissioner of Internal Revenue,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville.
Charles E. Simons, Jr., District Judge.

(Argued October 4, 1972 Decided January 19, 1973)

Before BOREMAN, WINTER and BUTZNER, Circuit Judges.

Leonard J. Henzke, Jr., *Attorney, Department of Justice,* (John K. Grisso, *United States Attorney,* Scott P. Crampton, *Assistant Attorney General,* Meyer Rothwacks, Grant W. Wiprud, *Attorneys, Department of Justice,* Tax Division, on brief) for Appellants; J. D. Todd, Jr., (Wesley M. Walker, James H. Watson, O. Jack Taylor, Jr., and Leatherwood, Walker, Todd and Mann on brief) of Appellee.

WINTER, Circuit Judge:

Bob Jones University (Jones University), a non-profit educational institution which concededly practices racial discrimination in the admission of students, sought a preliminary and permanent injunction to prevent Treasury officials from terminating its tax-exempt status. Treasury officials had begun administrative proceedings to that end in accordance with an announced policy of withdrawing tax-exemption and deductibility-assurance rulings of schools having racially discriminatory policies, when suit was filed. The district court denied the Treasury officials' motion to dismiss for lack of jurisdiction and granted an injunction *pendente lite*. Because we conclude that the district court lacked jurisdiction under § 7421 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421 to grant the requested relief, we reverse and remand the case for dismissal of the complaint.

I

Jones University is a fundamentalist religious organization which subscribes to the belief that God intended the various races of men to live separate and apart, and that intermarriage of different races is contrary to God's will and the teaching of the Scriptures. In furtherance of these beliefs, Jones University prohibits the admission of black students, it prohibits students it does admit from dating or marrying members of another race, whether students or not, and it accepts some Oriental students but only on condition that they will not date outside of their own race. Jones University has enjoyed tax-exempt status since at least April 30, 1942, under § 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 501(c)(3) and the predecessor code.

On July 10 and July 19, 1970, the Internal Revenue Service (IRS) announced publicly that it could no longer legally justify allowing tax-exempt status to private schools which have racially discriminatory admission policies, nor could it treat gifts to such schools as tax-deductible charitable contributions. It also stated that, although the non-discrimination

requirement would not affect a school's ordinary admissions policies which had no relation to race, the requirement would prohibit allowance of the tax benefits to church-related schools which discriminated on the basis of race. On November 30, 1970, IRS wrote a letter of inquiry to each school in the United States, including Jones University, announcing its new policy and requesting each school to furnish specific information regarding its admissions policy within thirty days. Jones University responded that it did not admit blacks.

There followed various communications and meetings between IRS and representatives of Jones University, each refusing to deviate from its original position. The suit was filed on September 9, 1971, and no further administrative steps were taken. Had suit not been filed there would have been further conferences at the level of the District Director and the National Office in Washington. Only if Jones University declined to abandon its racially discriminatory policies and IRS declined to alter its announced policy would Jones University's tax-exempt status be revoked, its records audited and a notice of proposed tax deficiencies issued. Even then, Jones University would have additional opportunities to seek administrative relief. See 9 Mertens Law of Federal Income Taxation (Rev.), §§ 49.110, 49.112, 49.114, 49.115, 49.118-49.124. If administrative relief was not forthcoming, IRS would issue a notice of deficiency, the legality and correctness of which could be litigated in the Tax Court, 26 U.S.C.A. § 6213, or, alternatively, Jones University could pay the tax and sue for a refund on the ground of illegality, 28 U.S.C.A. § 1346; 26 U.S.C.A. § 7422.

II

The controlling statute reads:

§ 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any

> tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions in the statute are inapplicable: §§ 6212(a) and (c) and 6213(a) permit suits in the Tax Court to litigate the legality and correctness or deficiency assessments and § 7426 (a) and (b) (1) relates to foreclosure proceedings and judicial sales with regard to property on which the United States has a tax lien and permits the United States to be joined and participate in cases of this nature.

Jones University contends, and the district court concluded, that the statute is inapplicable because no formal assessment of deficiencies had been made and thus the suit did not seek to enjoin an "assessment or collection" of any tax. We disagree. First, the administrative proceedings which had as their object the withdrawal of tax-exemption and deductibility-assurance rulings are directly involved with the assessment and collection of taxes from Jones University and those making contributions thereto. If those rulings are withdrawn, Jones University will be liable for taxes on any net income which it realizes and contributors to Jones University may not deduct from their gross income the amounts of their contributions. Either event would result in an increase in taxes.

A number of cases hold, or make clear, that a suit to enjoin the withdrawal of tax-exemption rulings, the withdrawal of which would ultimately result in potentially greater tax revenues, constitutes a suit to enjoin the "assessment" of a tax within the meaning of § 7421, and we are persuaded to follow them. *J. C. Penney Co. v. United States Treasury Dept.*, 439 F.2d 63 (1971), aff'g 319 F.S. 1023 (S.D. N.Y. 1970), cert. den. 404 U.S. 869 (1971); *Koin v. Coyle*, 402 F. 2d 468 (7 Cir. 1968); *Kennedy v. Coyle*, 352 F.2d 867 (7 Cir. 1965); *Zamaroni v. Philpott*, 346 F.2d 365 (7 Cir. 1965); *Crenshaw County Private School Foundation v. Connally*, ___F.S.___ (M.D. Ala. 1972) (on motion to dismiss); *Horton v. Humphrey*, 146 F.S. 819, 821 (D. D.C.), aff'd 352 U.S. 921 (1956)

(per curiam). The common sense of the matter is that where, as we have shown, the necessary result of granting the relief prayed would be to prevent the assessment of any tax, § 7421 is applicable.

The circumstances under which § 7421 is not to be applied, when it would otherwise appear to be applicable, are spelled out in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962). The test to permit a taxpayer successfully to enjoin the assessment or collection of a tax is twofold: first, he must show irreparable injury to himself if collection were effected, and second, he must show that "under no circumstances could the Government ultimately prevail" in its assertion of tax liability. 370 U.S. at 7. Otherwise, his remedy is to litigate the validity or amount of the tax by the statutory routes, i.e., appeal of assessment, or payment of the tax and suit for refund.

We have no doubt that Jones University will suffer irreparable injury if withdrawal of its tax-exempt status is effected even if it should ultimately prevail in its argument that its tax-exempt status may not legally be disturbed. Of course, the tax on any net income which may be imposed would be recoverable, but we would be naive indeed not to recognize the substantial portion that contributions play in the gross income of any institution of higher learning and the adverse effect on those contributions if their deductibility for income and estate tax purposes of the donors is disallowed. If Jones University is required to litigate its tax-exempt status after that status has been withdrawn, we can predict with confidence that during the period of litigation it will lose gifts and contributions which will never be recoverable even if it is successful in having its tax-exempt status restored. Thus, the first test of *Williams Packing*, irreparable injury, is met, and we consider the second.

We cannot conclude that "under no circumstances" could IRS be successful in withdrawing Jones University's favorable tax rulings. Although we decline the invitation of counsel for Jones University, extended in oral argument, to decide this case finally on the question of whether Jones University is

entitled to tax-exempt status, and consequently we are not to be understood as expressing any view on the ultimate merits of the dispute between IRS and the taxpayer, the recent decision in *Green v. Connally*, 330 F.S. 1150 (D. D.C. 1971), aff'd per curiam sub nom. *Coit v. Green*, 404 U.S. 997 (1971) makes apparent our conclusion. *Green* was a class action by Negro parents of school children attending public schools in Mississippi to enjoin U. S. Treasury officials from according tax-exempt status and deductibility of contributions to private schools in that state which discriminated against Negro students. The relief prayed was granted and on appeal the Supreme Court affirmed per curiam.

The essence of the decision of the D. C. district court may be distilled as follows: Section 501(c)(3) of the Internal Revenue Code, in granting tax-exempt status to "religious" and "educational" institutions requires that they also satisfy the common law concept of "charitable." At common law a charitable trust cannot be created for a purpose which is illegal or whose accomplishment would tend to frustrate some well-settled public policy. Hence there is presently serious doubt, in view of shifting racial attitudes as reflected in legislation and court decisions, that a charitable trust can legally be established, or an existing trust enforced, which establishes racially discriminatory educational institutions. Federal tax exemptions and deductions are generally not available for activities contrary to declared federal public policy. In the light of the Fourteenth Amendment, the decisions of the Supreme Court on the subject of school desegregation and the Civil Rights Act of 1964, the exemptions and deductions provided for charitable educational institutions are not available for private schools discriminating on grounds of race.

Because of the breadth of these holdings and their acceptance by the Supreme Court, we cannot conclude that IRS's contemplated withdrawal of tax-exemption and deductibility-assurance rulings is frivolous or that IRS "under no circumstances" may ultimately prevail. It follows that the second

requirement of *Williams Packing* has not been met and § 7421 is a complete bar to maintaining the action.

A final comment is necessary. While the district court found, and the dissenting member of the panel stresses, that the "primary purpose" of the Treasury officials in threatening to revoke Jones University's favorable tax status was not to assess and collect taxes but to exact compliance with certain political or social guidelines, i.e., discontinuance of racial discrimination, we think that the finding is irrelevant to the proper disposition of this case. Substantially the same argument was made and rejected in *Bailey v. George*, 259 U.S. 16 (1922). There the Court prohibited enjoining a collector of internal revenue from collecting the Child Labor Tax despite the argument that the tax was not for the purpose of raising revenue, but for the purpose of regulating child labor. In the *Bailey* case there was even more reason to accept the argument than in the case at bar because on the same day that Mr. Chief Justice Taft wrote that an injunction against the collection of the tax would be improper, the Court ruled, again in an opinion by Mr. Chief Justice Taft, that the Child Labor Tax was unconstitutional. Child Labor Tax Case, 259 U. S. 20 (1922). Hence, we deem rejection of the argument in *Bailey* as conclusive here.

Similarly, in *Singleton v. Mathis*, 284 F.2d 616 (8 Cir. 1960), the Court affirmed the denial of an injunction against the director of internal revenue who was proceeding to collect a gaming tax of $250 on each of two pinball machines. It appears to be obvious that the purpose of the tax was not to raise revenue, but was to control gambling because a $10 tax was the amount assessed against amusement devices by the same statute.

Accordingly, we reverse the judgment of the district court and remand the case for dismissal of the complaint.

REVERSED AND REMANDED.

BOREMAN, Senior Circuit Judge, dissenting:

For the reasons cogently stated by the district court in *Bob Jones University v. Connally*, 341 F. Supp. 277 (D. S.C. 1971), I respectfully dissent. I would add the following comments and observations.

Under § 7421 of the Internal Revenue Code, as interpreted in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), the burden upon one seeking to enjoin the collection of a tax is huge, indeed. A showing of irreparable harm, "such as the ruination of the taxpayer's enterprise," says the Court, 370 U.S. at 6, is *not* enough. It must be shown that "under no circumstances could the Government ultimately prevail." 370 U. S. at 7. It would appear obvious that, as a practical matter, such a standard could possibly be met only in the most exceptional and unusual circumstances.[1]

The reason for this exceptional administrative power has been found in the "manifest purpose" of § 7421, *i. e.*, that the United States must be "assured of prompt collection of its lawful revenue." *Williams Packing Co., supra*, 370 U.S. at 7. However, the United States is not primarily concerned here with the collection of revenue. The district court expressly found that the "primary purpose" of the Treasury officials in threatening to revoke the University's tax exempt status and tax deductible benefits to donors is *not* to assess and collect taxes, but through the use of taxing powers "to require private educational and religious institutions to comply with certain political or social guidelines." 341 F.Supp. at 284.

The University contends, *inter alia*, that the threatened actions of the Treasury officials would violate the First Amendment in that such actions would (1) deprive the University of the free exercise of its religious beliefs and, (2) promote, benefit and establish other religions. It certainly is not to be assumed that the Commissioner is possessed of "administrative

[1]For instance, it is unlikely that this court would assume to state positively, in advance, what the Supreme Court would hold under *any* given set of circumstances. To do so would be presumptuous, indeed.

expertise" with respect to the question presented, or that his legal opinion is in any way entitled to exceptional weight. Indeed, it would appear to me that the threatened acts of the defendants may well be subject to serious challenge as arbitrary and capricious and beyond the scope of their statutory power and authority.[2]

The majority decision would permit the Government to irreparably damage the University by actions taken upon a legal determination by the Commissioner not directly related to any "tax law," for a purpose not directly related to the collection of any tax, upon the merest chance that the Commissioner might be right. On the facts of this case, I can find no reason, purpose or justification for permitting the Government, absent proper judicial scrutiny going substantially beyond the "under no circumstances" test of *Williams Packing Co.*, to so proceed against the University. Surely such was not the intent of Congress in enacting § 7421, nor the meaning of the Supreme Court in *Williams Packing Co.*

Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionally mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University. To permit such threatened action in these circumstances without affording the University a right to judicial consideration would tend to demonstrate that the age old phrase – *"The power to tax is the power to destroy"* – is literally true.

No case is cited by the Government which applies the strict *Williams Packing Co.* test in circumstances similar to those in the instant case. I reach the conclusion that the application of that test here may well present a question as to the constitutionality of § 7421.

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[2]The district court found that the University "has made a prima facie showing that the defendants have surpassed, or are in the process of exceeding, their statutory authority as granted to them by the Congress in the Internal Revenue Laws." 341 F.Supp. at 285.

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 72-1075

Bob Jones University,

Appellee,

v.

John B. Connally, Secretary of the Treasury of the United States and Johnnie M. Walters, Commissioner of Internal Revenue,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville.
Charles E. Simons, Jr., District Judge.

Submitted February 5, 1973 Decided March 21, 1973.

Before BOREMAN, Senior Circuit Judge, and WINTER and BUTZNER, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

Bob Jones University (Jones University) petitions for rehearing and suggests rehearing in banc on the ground, *inter alia*, that our decision is in conflict with the decision of the District of Columbia Circuit in *"Americans United" Inc. v.*

Walters, ___F.2d___ (D.C. Cir. January 11, 1973). Of course we were unaware of *Americans United* in deciding our case, but we see no conflict between the two.

In *Americans United*, the District of Columbia Circuit held that the taxpayer was not barred by § 7421 from seeking to have declared unconstitutional, and to enjoin the enforcement of, the provision of § 501(c)(3), I.R.C. of 1954, which denies tax-exempt status to an organization, otherwise exempt under that statute, which engages substantially in activities to influence legislation or participates in political campaigns.

An examination of the opinion discloses that Americans United was exempt from taxation on its own income by both §§ 501(c)(3) and 501(c)(4), I.R.C. 1954. By virtue of its exemption under § 501(c)(3), contributions were deductible by donors. *Only* the 501(c)(3) exemption was revoked. As a consequence, *only* the deductibility of contributions by donors was removed; the exemption from taxation of its other income was not removed from Americans United. The Court ruled that individual donors could not litigate the deductibility of their contributions; and as a result, the only way in which the question of deductibility of contributions could be litigated was by Americans United in the suit which it filed. In a literal sense, such a suit by Americans United was not a suit for the purpose of restraining the assessment or collection of any tax as proscribed by § 7421 since no revenues taxable to Americans United could be affected.

The same is not true with respect to Jones University. In our case, the sole exemption lay in § 501(c)(3) and this exemption was the one sought to be revoked on the ground of racially discriminatory policies. If the revocation was proper, not only would contributors to Jones University not be entitled to a deduction for their contributions, but Jones University would be taxable on its other income. Because of the latter, the suit was one literally within § 7421, i.e., a suit to restrain the assessment or collection of a tax.

Thus, we think that the cases are distinguishable. Jones University's other grounds for granting the petition also do

not persuade us. Therefore, with Judge Boreman dissenting, we deny rehearing. No judge eligible to do so has requested a poll on the suggestion for rehearing in banc.

PETITION DENIED.

Appendix B

BOB JONES UNIVERSITY, Plaintiff,

v.

John B. CONNALLY, Secretary of the Treasury of the United States, and Johnnie M. Walters, Commissioner of Internal Revenue, Defendants.

Civ. A. No. 71-891.

United States District Court,
D. South Carolina,
Greenville Division.

Nov. 17, 1971.

* * * * *

* * * * *

J. D. Todd, Jr., Wesley M. Walker, O. Jack Taylor, Jr., Greenville, S. C., for plaintiff.

John K. Grisso, U. S. Atty., Greenville, S. C., Stanley F. Krysa, Atty., U. S. Justice Dept., for defendants.

ORDER

SIMONS, District Judge.

This matter is before the court upon plaintiff's Complaint seeking an injunction *pendente lite*, and upon defendant's Motion to Dismiss plaintiff's Complaint for lack of jurisdiction.

The court received briefs and heard arguments on October 4, 1971, with regard to both the Motions. From the Complaint, affidavits and supporting documents, and the deposition of William H. Connett, Assistant to the Commissioner of Internal Revenue, and from a study of statutory provisions, rules and regulations and authorities involved, the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Bob Jones University is an eleemosynary corporation, organized and granted its certificate of incorporation on November 20, 1952. The University's predecessor was known as Bob Jones College, which was founded near Panama City, Florida, in 1926. The plaintiff was originally founded and has continued to exist as a fundamentalistic, religious organization which has chosen the field of education, principally at the college level, as the vehicle through which to teach and promulgate its fundamentalistic religious beliefs. The creed of the college as originally founded and the purpose clause of its charter is as follows:

> The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures; combatting all atheistic, agnostic, pagan, and so-called scientific adulterations of the Gospel; unqualifiedly affirming and

teaching the inspiration of the Bible (both the Old and the New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Savior, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.[1]

2. It further appears from the affidavit of Dr. Bob Jones, III, President of the University, as well as from the affidavits of Dr. Bob Jones, Jr., Chairman of the Board, and Dr. R. K. Johnson, Secretary-Treasurer and Business Manager, that the University's fundamentalistic religious beliefs and practices include the belief and principle that God intended that the various races of men should live separate and apart, and that the inter-marriage of different races is contrary to the will of God, and to the teachings of the Holy Scriptures. In keeping with this religious belief and principle, the University has adopted an admissions policy prohibiting the admission of black students to the University.[2] The plaintiff has also adopted a rule prohibiting its students from dating or marrying members of another race, whether students or not. Violation of this rule results in expulsion from the University. The University believes it would be impossible to enforce that rule if the University were to adopt a racially nondiscriminatory admissions policy (affidavit of Dr. Bob Jones, III). The University requires all students to attend daily chapel services at which the religious views and principles of the University are taught, and all classes and meetings held under the University sponsorship are begun and ended with prayer. All students, with inconsequential exceptions, are required to take courses in religion each semester. All faculty members are required to teach and adhere to the religious beliefs and principles of the school, and any member of the faculty or member of the student body teaching or promoting religious beliefs contrary to those of the University is subject to dismissal. The admissions standards of the University relate not only to academic achievement but also to the religious convictions of a given applicant as well. The University does not now accept, and has not in the past accepted, federal or state grants in aid, nor does it participate in any programs financed by the federal or state governments because the University apparently understands that if it did so it would be required to adopt a racially nondiscriminatory admissions policy which would be contrary to its religious beliefs and practices.

3. The University has apparently enjoyed tax exempt status since its formation, although the records of the University do not go back that far in this regard. The record contains a letter dated March 30, 1951,[3] received by the University from the then Deputy Commissioner, advising that it qualified as a tax exempt organization, which also referred to a similar ruling of April 30, 1942. The record substantiates that there has been no significant change in the University's practices, principles, or policies since that date.

4. News releases of the Internal Revenue Service issued on July 10 and July 19, 1970, constituted the first threat to the University's tax exempt status. Thereafter the University received a letter of inquiry from the District Director of Internal Revenue requesting information concerning the admissions policies of the University with regard to race.

1. See Page 2 of the affidavit of Dr. Bob Jones, III, and certified copy of certificate of incorporation attached thereto.

2. One married black part-time student has recently been admitted to the University.

3. Copy of letter attached to the affidavit of Dr. R. K. Johnson, Secretary-Treasurer and Business Manager of the University.

A copy of that letter is attached to the affidavit of Dr. Bob Jones, III. The University's reply was in the form of a letter dated December 30, 1970, which is attached to the affidavit of Mr. William H. Connett. During 1971 various conferences and discussions were held between officials of the Internal Revenue Service, including former Commissioner Randolph W. Thrower, and the present Commissioner, Johnnie M. Walters, and attorneys for the plaintiff. These discussions culminated on or about September 8, 1971, when counsel for the plaintiff concluded that a clear threat existed that the University's status as a tax exempt organization was about to be revoked, and that the advance assurance of deductibility of contributions previously given by the Internal Revenue Service to its contributors was about to be withdrawn.

5. The following day, September 9, 1971, the plaintiff instituted this action, alleging that this threatened action would inflict irreparable harm upon the University, that such threatened action was unlawful in that it exceeded the authority vested in the defendants by Congress, was contrary to the provisions of § 501(c) (3) of the Internal Revenue Code, and would be in violation of the First and Fifth Amendments to the Constitution of the United States. Plaintiff, accordingly, requested temporary and permanent injunctive relief from this court.

[1] 6. One of the grounds urged by defendants in support of their Motion to Dismiss is that plaintiff has not exhausted the administrative remedies available to it under Revenue Procedures 68–17 and 69–3. Mr. Connett's affidavit sets forth the administrative procedures which would be employed were this court not to grant injunctive relief. However, from his affidavit and deposition it appears that there remains very little doubt as to the ultimate loss of plaintiff's tax exempt status. In his deposition Mr. Connett states that plaintiff's tax exempt status would be revoked under the existing law, unless the plaintiff chose to change its admissions policy to comply with the requirements of the IRS and admit black students on a nondiscriminatory basis.[4] It is thus concluded that any attempt by the plaintiff to follow these administrative procedures would most probably be a useless act, inasmuch as the decision to revoke the tax exempt status of any organization not willing to adopt a racially nondiscriminatory admissions policy apparently has already been made by the Washington Office of the Internal Revenue Service.

A review of the procedures outlined in Mr. Connett's affidavit indicates that by subjecting itself to these procedures the plaintiff would likely suffer irreparable damage. Mr. Connett reveals a sequential process by which, first, advanced assurance of deductibility of contributions would be withdrawn, and second, the University would be denied tax exempt status and then taxes assessed and collected. Undoubtedly a period of many

4. Numerous news releases with a Washington dateline have been noted recently in which it is indicated that many private schools in this and other states have been noticed by the IRS that they will lose their tax exempt status unless they certify that they have adopted a racial nondiscriminatory admissions policy.
Furthermore, plaintiff submitted the affidavit of Mr. Joe N. Cocke, who states that the IRS withdrew its prior assurance of deductibility of contributions made to Fayette Academy, and thereafter revoked the Academy's tax exempt status. Attached to his affidavit is a letter dated January 12, 1971, signed by the District Director of the Internal Revenue Service, Atlanta, Georgia. The District Director referred to a previous letter dated December 3, 1970, notifying the Academy of the suspension of advance assurance of deductibility of contributions to that organization pending final determination of its status. The letter goes on in Paragraph 3 to advise the academy of its right to protest and its right to have conferences at both the District and National Office levels. The fourth paragraph of that letter states: "A conference at either the District or National Office would probably serve no useful purpose if you have no intention of adopting a racially nondiscriminatory admissions policy. . . . ."

months would elapse between the time that advanced assurance of deductibility of contributions would be withdrawn and a tax finally assessed and collected, thus requiring redress in the courts pursuant to 26 U.S.C.A. § 6213; 28 U.S.C.A. §§ 1346(a)(1), 1491; 26 U.S.C.A. §§ 6532, 7452. It is to be expected that while the Internal Revenue Service is conducting administrative conferences leading to the assessment and collection of a tax, the plaintiff's contributions, upon which it relies heavily, would be curtailed, if not eliminated altogether. Under these circumstances these administrative procedures would serve no useful purpose.

[2] The plaintiff would likely suffer irreparable harm if the threatened action is not enjoined. Plaintiff submitted, in addition to the affidavits previously referred to, the affidavit of another of its counsel, O. Jack Taylor, Jr.; John E. Fowler, C.P.A., employed by the University for the past twenty-five years or more; Jo Ann Hatcher, donations secretary to the University; and affidavits from ten of its contributors. The force and effect of these affidavits is as one might expect: the financial lifeblood of the University to a substantial extent is dependent upon contributions made to it. It appears that cash donations are received daily. During the twenty-day period from September 1 through September 20, 1971, the University received individual cash gifts totaling $29,695.83. The cash contributions for the year, from August 30, 1970 to August 28, 1971 exceeded $500,000. Attorney Taylor's affidavit attaches correspondence passing between him and counsel for the Nationwide Foundation in the early part of 1971, to the effect that the Nationwide Foundation, which formerly had made matching grants to the University, would because of the threatened action, no longer continue their program of matching grants. Affidavits from the ten individual contributors stated that their donations to the University materially depended upon their assurance that the same would be deductible on their individual income tax returns, and that should the Internal Revenue Service withdraw such assurance of deductibility, their respective contributions would be severely curtailed. The affidavits of the officials of the school substantiate the conclusion that should this financial assistance be curtailed, the University's existence would be jeopardized; and that in an effort to make up for its loss of income received through contributions and to replace the moneys expended in attempting to attain a taxpaying status from a records standpoint (estimated by the accountant Fowler to be between $80,000 and $100,000), the University would be forced to revise upward its fees and tuition, with the attendant disruption in the educational programs of its students, and the curtailment of future applications caused by such increases. In addition, the University has a funded indebtedness, as well as an expansion program, which would be placed in jeopardy, and members of its faculty and staff would undoubtedly suffer through the possible loss of current income and retirement programs.

The defendants contend that no irreparable harm would result to the University because of the fact that it could compute and pay its tax and seek refund or otherwise contest the same in either the district court or the tax court. As previously indicated, however, the real harm—the loss of contributions and its attendant consequences—would already have transpired and could not realistically be remedied by this process.

7. The statutory provisions under which plaintiff previously has been granted tax exemption, § 501(c)(3), of the Internal Revenue Code of 1954, provide exemption from taxation for:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the

benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this action. 28 U.S.C. § 1331 et seq.

[3, 4] As previously indicated, the court has concluded that this action is not premature because of a failure, on plaintiff's part, to exhaust available administrative remedies. Further, the court concludes that it is not barred from entertaining jurisdiction of the within action because of defendant's other objections thereto. Defendants contend that plaintiff's action seeks an injunction to avoid the assessment and collection of taxes and is barred by the anti-injunction statute, § 7421(a), and cannot be the subject of a declaratory judgment proceeding, since 28 U.S.C. § 2201 permits such actions except those "with respect to federal taxes"; and, that it is also barred by the principle of sovereign immunity.

Up until now there has been no assessment or even an attempt at assessment of any tax insofar as Bob Jones University is concerned. The defendants admit that assessment procedures would not be commenced until the administrative procedures which they contend are available to the plaintiff have been exhausted; and that no tax would be due if plaintiff's exempt status were then revoked until some time in the calendar year 1972. Technically this suit does not involve an attempt to enjoin the assessment and collection of a tax. Recognizing this, the defendants argue that the word "assessment" includes all acts that are necessarily prerequisite to the actual act of making the assessment, and rely upon Calkins v. Smietanka, 7 Cir., 240 F. 138 (1917); Campbell v. Guetersloh, 287 F.2d 878 (5 Cir. 1961); Wahpeton Professional Services, P. C. v. Kniskern, 275 F.Supp. 806 (D.C.N.D.1967); Koin v. Coyle, 402 F.2d 468 (7 Cir. 1968); Chester v. Ross, 231 F.Supp. 23 (N.D.Ga.1964), aff'd. 351 F.2d 949 (5 Cir. 1965); Cooper Agency, Inc. v. McLeod, 235 F.Supp. 276 (D.C.S.C.1964). In each of these cases, an attempt was made to enjoin an action on the part of the Internal Revenue Service directly involved with either the assessment or collection of a tax. In *Calkins* the injunction sought to prevent the production of records during an audit. In *Campbell* the injunction sought to prevent the Service from determining tax due based upon the "bank deposits" method of reconstruction of income. In *Wahpeton*, the action was brought under the declaratory judgment act seeking a declaration as to whether the alleged taxpayer qualified as a corporation and trust for tax purposes. The *Koin* case involved the attempt to assess wagering taxes and involved evidentiary issues thereabout. And in *Chester* there was similarly involved an attempt to suppress the use of evidence because of an injunction procedure where a tax assessment was directly involved.

The court has considered those cases dismissing actions for want of jurisdiction where the question presented involve the tax exempt status of institutions. Jolles Foundation, Inc., v. Moysey, 250 F.2d 166 (2 Cir. 1957); Kyron Foundation, Inc. v. Dunlap, 110 F.Supp. 428 (D.D.C.1952). The court is convinced that the principles enunciated in those cases are not applicable nor controlling here. The plaintiff does not ask this court to substitute its judgment for that of a federal officer acting in his official capacity. The gravamen of plaintiff's Complaint is that the defendants are threatening to act outside of their authority to exercise judgment and discretion which are not within the legal limits of their authority in such circumstances, since they are purporting to act beyond the authority granted by the

constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress.

If the question here were the applicability of the threatened action to the plaintiff rather than the validity of the action itself, the court would most probably be persuaded to take a different view. If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the applicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal officer which it would be powerless to do. However, the plaintiff readily concedes that it practices a racial discriminatory admissions policy, placing it squarely in violation of the avowed policy of defendants. Thus, this is not a case where the defendants or the court must decide the question of whether the University has a racially nondiscriminatory admissions policy. Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.

Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm of plaintiff, the 4,500 students who attend the plaintiff University, some 650 faculty and staff members, and of the public which is served by the existence of the University.

The Supreme Court has decided many cases in which it has stated the obvious purpose for which the anti-injunction statute was enacted. In Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 292, the Court said:

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.

The courts have consistently applied this statute in those cases which do not come within the exception thereto, and have refused to entertain jurisdiction of suits seeking injunctions against the levy, assessment, and collection of federal taxes. Many years after the adoption of the original anti-injunction statute, Congress enacted the declaratory judgment act which taxpayers were quick to utilize to avoid the effects of the anti-injunction act. Congress rightfully put an end to such suits by amending the declaratory judgment act by inserting the phrases "except with respect to Federal taxes," which removed the jurisdiction of federal courts to hear declaratory judgment proceedings with respect to the levying, assessment and collection of federal taxes.

Jurisdiction of suits of the nature of this case has been exercised by the courts for many years. For instance, see Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822 (1922) and cases cited therein. In *Hill*, plaintiff sought to enjoin the Commissioner of Internal Revenue from imposing a tax on contracts for the sale of grain for future delivery. The Commissioner moved, as he does in the matter before this court, to dismiss the suit, contending that the action was an attempt to enjoin the collection of a tax, contrary to a predecessor of § 7421(a) of the current Internal Revenue Code. The Supreme Court held that such was not the nature of the action

brought by the plaintiffs in *Hill*. In doing so, the Court said:

> It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of Boards of Trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal. . . . The manifest purpose of the tax is to compel Boards of Trade to comply with regulations, many of which can have no relevancy to the collection of a tax at all. . . . The act is in essence and on its face a complete regulation of Boards of Trade, with a penalty of 20 cents a bushel on all "futures" to coerce Boards of Trade and their members into compliance.

[5] Likewise the record in this case supports the conclusion that the primary purpose of requiring Bob Jones University to adopt a racial nondiscriminatory admissions policy is not to levy, assess, and collect a tax from the plaintiff, but is being done solely for the purpose of complying with a recently espoused policy of the Internal Revenue Service to require certain private educational and religious institutions to adopt and administer racially nondiscriminatory admissions policies and practices. It is obvious that if the plaintiff will agree to the demands of the defendants and change its admissions policy so as to admit blacks on a nondiscriminatory basis, the tax exempt status held by the plaintiff with the express approval of the defendants for a period in excess of forty years will continue in full force and effect.

The conclusion is inescapable that the primary purpose of the defendants in threatening the revocation of the plaintiff's tax exempt status is not to assess and collect taxes, but to compel, through the use or threat to use, taxing powers to require private educational and religious institutions to comply with certain political or social guidelines with regard to the question of racial integration. As such, the plaintiff's action should not be barred by 26 U.S.C. § 7421(a), or 28 U.S.C. § 2201. In finding that this case is barred neither by the anti-injunction statute nor provisions of the Declaratory Judgment Act, the court is mindful of the decision in DeMasters v. Arend, 313 F.2d 79 (9 Cir. 1963). In *DeMasters*, the taxpayer sought to restrain the Internal Revenue Service from investigating the possible income tax liability for years barred by the statute of limitations in the absence of fraud. There the court said:

> . . . If appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the doctrine of sovereign immunity.

In a footnote the Court stated:

> We are also satisfied that this taxpayers' suit is neither one for declaratory judgment "with respect to federal taxes" precluded by 28 U.S.C.A. § 2201; nor an action "for the purpose of restraining the assessment or collection of any tax" precluded by 26 U.S.C.A. § 7421(a).

[6, 7] The court also concludes that this action is not barred by the Doctrine of Sovereign Immunity. It has long been recognized that the sovereign cannot act illegally or unconstitutionally and, therefore, if an act or threatened action is unconstitutional or illegal it is not the action of the sovereign and such acts or threatened acts can be enjoined. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882); Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 409 F.2d 718 (2 Cir. 1969). Since the primary thrust of plaintiff's action is that it is seeking to enjoin a threatened illegal and unconstitutional act, it is concluded that the court is not deprived of jurisdiction because of the Doctrine of Sovereign Immunity.

Based on the foregoing the court concludes that defendants' Motion to Dismiss should be denied.

2. Plaintiff's Motion for an injunction *pendente lite* should be granted.

[8] Based on the present record, the court finds that plaintiff has made a prima facie showing that the defendants have surpassed, or are in the process of exceeding, their statutory authority as granted to them by the Congress in the Internal Revenue Laws.

In this connection, the court is not unaware of the three-judge district court decision in Green v. Kennedy et al., 309 F.Supp. 1127 (1970). It is concluded that the *Green* case is distinguishable both on its facts and in the legal issues presented therein. In the first place, the plaintiff school here has practiced the admissions policy now in issue for over forty years, whereas, in the *Green* case, the private schools whose tax exempt status was being challenged were only recently established "as an alternative available to white students seeking to avoid desegregated public schools." Then, too, the present plaintiff contends, and has introduced substantial evidence in support of such proposition, that its admission policy is, and always has been, based on religious considerations.[5] The *Green* court was not confronted with such a substantial conflict between constitutional rights—that is, the right of religious organization to practice its teachings without being treated any differently than any other religious group by the United States government versus the right not to be discriminated against on the basis of race—when it reached its decision. In point of fact, the *Green* court not only was not faced with this issue, but also was without the benefit of the reasoning and holding contained in the more recent case of Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); the case plaintiff relies upon so heavily in support of its interpretation of the aforesaid constitutional right it advances. In the *Walz* case the Supreme Court held that "for the government to exercise at the very least this kind of benevolent neutrality, [tax exemption,] toward churches and religious exercises generally *so long as none was favored over others and none suffered interference*" was not a violation of the religious clauses of the First Amendment. In this context, and for the sole purpose of considering this request for temporary relief, this court concludes that the rationale and the holding of the *Green* case are not controlling herein.

Another reason why the court is disposed to grant plaintiff's Motion is that upon balancing the equities and weighing relative hardships that would be incurred by the respective parties if the relief asked for is granted or denied, it concludes that the equities lie in favor of granting the temporary injunction. In the event temporary injunctive relief is denied to the plaintiff, and should it prevail after a trial on the merits it could not, in all likelihood, recover the loss of contributions which it probably would experience because of the threat of loss of its tax-exempt status. On the other hand, should the defendants prevail in the trial they would not have incurred any substantial monetary expense, loss, or other irreparable harm, since any taxes that plaintiff might then be required to pay would not be due and owning until April 15, 1972, a date long after a decision on the merits should have been reached; and they would have been enjoined from revoking plaintiff's tax-exempt status only for a short period of time. Moreover, as the court previously observed, the revocation of plaintiff's tax-exempt status is not being attempted for the purpose of raising additional tax revenues, but for the purpose of compelling plaintiff to adopt a nondiscriminatory admission policy. Whether or not the defendants will ultimately achieve this goal is not a question for this court to answer, but in

5. This is but one of several constitutional rights that plaintiff contends will be violated if its tax exempt status is revoked.

view of the aforesaid substantial clash of constitutional guaranties involved in this controversy this court does believe, and accordingly decides, that if in fact the outcome of this litigation will have any effect on the attainment of this goal such a result should come only after a trial on the merits has been had. It is, therefore,

Ordered that the defendants' Motion to Dismiss be, and it hereby is denied; and, it is further

Ordered that the defendants, their agents, servants, deputies, employees, successors in office and all persons in active concert with them, are hereby enjoined *pendente lite* from revoking or threatening to revoke the tax exempt status of plaintiff, and further enjoined *pendente lite* from withdrawing advanced assurance deductibility of contributions solely because of the admissions policy of plaintiff pending a final hearing and determination of this cause on the merits.

Appendix C

Notice: This opinion is subject to normal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 71-1299

"AMERICANS UNITED" INC., et al, *Appellants*

v.

JOHNNIE M. WALTERS, *Commissioner of Internal Revenue*

Appeal from the United States District Court
for the District of Columbia

Decided January 11, 1973

Mr. Alan Morrison, with whom *Mr. Franklin C. Salisbury* was on the brief, for appellants.

Mr. Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice, with whom *Messrs. Thomas A. Flannery*, United States Attorney at the time the brief was filed, and *Grant W. Wiprud*, Attorney, Tax Division, Department of Justice, were on the brief, for appellee.

Before: Fahy, *Senior Circuit Judge*, Tamm and Wilkey, *Circuit Judges*.

Opinion by *Circuit Judge* Tamm.

Concurring Opinion by *Circuit Judge* Wilkey at p. 24.

Tamm, *Circuit Judge*: This case comes to us on appeal from an order in the district court denying appellants' (Plaintiffs below) petition to convene a three-judge district court pursuant to the provisions of 28 U.S.C. § 2282 (1970), and granting appellee's motion to dismiss. For the reasons stated at length below we affirm the action of the district court as it pertained to the individual appellants involved, but as to the corporate appellant reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Appellant Americans United, incorporated as "Protestants and Other Americans for Separation of Church and State," is organized under the laws of the District of Columbia and is a nonprofit educational corporation. On July 3, 1950, the Commissioner of Internal Revenue issued a ruling that Americans United qualified as tax exempt under § 101(6) of the Internal Revenue Code of 1939, the predecessor to § 501 (c)(3) of the 1954 Code.[1] Consequently, for a period of nearly twenty years not only was Americans United free from taxation upon its income, but also contributors to the corporation were entitled to the deductions provided under § 170 of the 1954 Code (§ 23(q) of the 1939 Code).[2] On April 25,

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[1]26 U.S.C. § 501(c)(3) (1970):

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[2]Organizations which have secured rulings that they are tax exempt under § 501(c)(3) are described in I.R.S. Publication No.

1969, a letter ruling from the Service revoked the 1950 ruling, holding that Americans United had violated §§ 170(c)(2)(D) and 501(c)(3) of the Code by devoting a substantial part of its activities to attempts to influence legislation. More particularly, the letter ruling stated that although part of Americans United's activities could be classified as "educational" or "charitable" within the meaning of § 501(c)(3) of the Code, it was, nonetheless, an "active advocate of a political doctrine." The majority of the corporation's activities were held to be in furtherance of the following goals: "the mobilization of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all "patriotic' citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools."

While Americans United still retained a tax exempt status as an organization described in § 501(c)(4) of the Code,[3] the removal of its § 501(c)(3) exemption allegedly proved to be most damaging. Americans United states that its resulting removal from the list of § 170 corporations to whom tax free contributions could be made dried up its well of contributory resources to such an extent that it operated at a deficit for the

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78, *Cumulative List, Organizations Described in Section* 170(c) *of the Internal Revenue Code of* 1954. The requirements for §§ 501(c)(3) and 170(c)(2) are nearly identical in every respect.

[3]26 U.S.C. § 501(c)(4) (1970):

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

first time in its history during fiscal year 1970. Consequently, on July 30, 1970, this action was commenced in the United States District Court for the District of Columbia. Two individual plaintiffs, Archer and Lowell, apparently suing as taxpayers who intended in the future to contribute to Americans United, joined with Americans United in bringing the class action.

The amended complaint in the district court averred violations of various first and fifth amendment liberties and guarantees: (1) §§ 170 and 501, and the action of the Commissioner in giving force and effect thereto, were unconstitutional and void insofar as they denied § 501(c)(3) status to the corporate appellant by reason of its exercise of first amendment rights, and likewise denied individual appellants the privilege of deducting the contributions used as a vehicle to exercise their first amendment rights. (2) Since what was a "substantial part" in the case of Americans United was not a "substantial part" in the case of other, larger organizations opposed to appellants' viewpoint, the change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and influencing legislation was an unreasonable classification against Americans United, and by reason thereof Americans United and other organizations similarly situated were being discriminated against and denied equal protection of the laws in violation of the fifth amendment of the United States Constitution. (3) Appellants claimed that their tax dollars were being used by reason of §§ 170 and 501 in a manner that aided and strengthened churches whose size permitted their influencing of legislation to be "relatively less substantial than that of the corporate [appellant]," and that appellee's actions in enforcement thereof constituted violations of the establishment and free exercise clauses of the first amendment. (4) The exemption clause of § 501(c)(3) amounted to an invalid delegation of legislative power "in that the statutory standards of 'substantiality' and 'propaganda' [were] lacking in specificity for the carrying out of the purpose of Section 501(c)(3)." (5)

Finally, the defendant acted arbitrarily and capriciously in abuse of his discretion in applying, in this situation, the "substantial influencing" clause of the statutory exemption of § 501(c)(3).

Appellants' complaint founded jurisdiction for the action upon 28 U.S.C. § 1331 (1970) (civil action where amount in controversy exceeds $10,000 and which arises under the Constitution and laws of the United States), 28 U.S.C. § 1340 (1970) (whereby jurisdiction is bestowed in the federal district court in any civil action arising under an Act of Congress providing for internal revenue), and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970) (making final agency action subject to judicial review). Appellants also sought the convention of a three-judge district court pursuant to 28 U.S.C. §§ 2282[4] and 2284 (1970), and requested the following relief: (1) Declaratory judgment that the "exemption clauses of Section 501(c)(3) [were] separable from the remainder of the section and [were] null and void" as unconstitutional under the first and fifth amendments, and as an invalid delegation of legislative power.[5] (2) Judgment "re-

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[4]28 U.S.C. § 2282 (1970):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[5]In this manner the appellants seek to continue the viability of § 501(c)(3) without the challenged "substantial part" exception to the exemption. As the Court of Appeals for the Tenth Circuit has recently stated: "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute." Moritz v. Commissioner, No. 71-1127 (November 27, 1972), at p. 8. *Cf.* Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring), and Skinner v. Oklahoma, 316 U.S. 535, 542-43 (1942).

quiring" the appellee to "reevaluate" corporate appellant as a § 501(c)(3) charitable corporation and to reinstate corporate appellant on the *Cumulative List, Organizations Described in Section* 170(*c*) *of the Internal Revenue Code of* 1954, if found to be eligible under the newly constituted § 501(c)(3). (3) Judgment restraining the appellee from enforcing §§ 170 (c) and 501(c)(3) so as to deprive the individual appellants "of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections." (4) Judgment that appellee acted in an arbitrary and capricious manner in changing the status of corporate appellant. (5) In the alternative, judgment requiring appellee to reopen the revocation proceedings and reevaluate the corporate appellant "in the light of the final decision in this case."

Appellee filed a motion to dismiss, based essentially on 28 U.S.C. § 2201 (1970),[6] which prohibits declaratory judgments "with respect to Federal taxes," and 26 U.S.C. § 7421 (a) (1970),[7] which prohibits suits "for the purpose of restraining the assessments or collection of any tax." The trial court denied appellants' petition to convene a three-judge court, finding that no substantial constitutional question was raised,

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[6]28 U.S.C. § 2201 (1970):

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[7]26 U.S.C. § 7421(a) (1970):

> Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions provided are not applicable to this case.

and granted appellee's motion to dismiss, citing *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963).

Alleging error in both aspects of the trial court's order, appellants bring this appeal. Contending that no taxes have been assessed or collected, that this is a civil rights rather than tax case, and that they have no other adequate remedy, appellants maintain that the provisions of 26 U.S.C. § 7421(a) (1970) and 28 U.S.C. § 2201 (1970) cannot be used to prohibit the declaratory and injunctive relief sought. They further contend that they have raised substantial constitutional questions meriting the invoking of a three-judge court under the standards established in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). Appellee's posture on appeal is somewhat different, of course, and in addition to the grounds listed by the trial judge for dismissing the action he relies upon the doctrine of governmental immunity, claiming this to be an unconsented suit against the United States. *Louisiana v. McAdoo*, 234 U.S. 627 (1914).

II. JURISDICTION

1. *Introduction*

The statutes providing for three-judge "constitutional" courts, adopted to avoid impolitic action on the part of lone federal district judges in matters of broad regulatory scope, are procedural rather than substantively jurisdictional in nature. A complaint which raises substanial constitutional questions and otherwise meets the requirements of § 2282 can and should be dismissed if independent district court jurisdiction is found wanting. "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District court has jurisdiction." *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). This court has held that a dismissal for want of jurisdiction is properly a matter for a single district judge without considering the question of convening a three-judge court. *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960). *Accord*, *Nation-*

al Council on the facts of Overpopulation v. Caplin, 224 F. Supp. 313 (D.D.C. 1963). The first order of business for the single district judge is simply put (although, as here, not so simply decided): Does the district court have jurisdiction even to consider the applicability of a three-judge panel, or are the plaintiffs out of court for lack of subject matter jurisdiction?

The anti-injunction statute (26 U.S.C. § 7421 (1970)) by its terms denies jurisdiction to "any court" in actions seeking to enjoin the assessment or collection of taxes. If such a statute is applicable here the appellants cannot be afforded the relief requested, regardless of the substantiality of the constitutional questions raised. *See, e. g., Harvey v. Early*, 160 F.2d 836 (4th Cir. 1947).

Although its legislative history may be "shrouded in darkness,"[8] the *raison d'etre* of § 7421(a) was illuminated by Chief Justice Warren in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. *In this manner the United States is assured of prompt collection of its lawful revenue.* (Emphasis added, footnote omitted.)

See also State Railroad Tax Cases, 92 U.S. 575, 613-14 (1875). Section 7421(a) was thus born of administrative and governmental necessity, used to prevent intermeddling in the tax collection process. An offspring of the equity rule that a suit to enjoin the collection of taxes was not maintainable unless an adequate remedy at law was lacking, its language is much stronger and more encompassing in scope. Even if it can be shown that irreparable injury will result if the collection is

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[8]*See* Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 Harv. L. Rev. 109 (1935).

effected, § 7421(a) bars a suit for an injunction in the absence of very special circumstances. *See Enochs, supra*, 370 U.S. at 6.

The history of the Declaratory Judgments Act and § 2201 is somewhat different. When initially promulgated in 1934,[9] the phrase "except with respect to federal taxes" was absent from § 2201. Consequently, federal taxpayers (innovative as they are) quickly utilized it to obtain declaratory judgments holding various tax statutes unconstitutional, something they were barred from accomplishing under the anti-injunction statute.[10] Congress (innovative as it is) quickly reacted and amended § 2201 to include the contentious phrase.[11] The Senate Finance Committee, in reporting out the amended version, stated that the "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress [as represented today by §7421(a)] with respect to the determination, assessment, and collection of Federal taxes."[12] Literally broader than § 7421(a) in its preclusion of tax oriented remedies, the § 2201 exception has literarily been found coterminus with that provided by § 7421(a). *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972). *See also Bullock v. Latham*, 306 F.2d 45 (2d

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[9]Act of June 14, 1934, ch. 512, 48 Stat. 955.

[10]*See, e.g.*, Penn v. Glenn, 10 F.Supp. 483 (W.D. Ky. 1935), *app. dismissed per curiam*, 84 F.2d 1001 (6th Cir. 1936), and F.G. Vogt & Sons, Inc. v. Rothensies, 11 F.Supp. 225 (E.D. Pa. 1935). Although both courts refused to grant injunctive relief, they expected the tax collector to "respect the decision." If he did not do so and the taxpayer was forced to sue for a refund, "the trial court would probably be justified in refusing him a certificate of probable cause, and thus he and his bond would be liable for the judgment obtained." 11 F.Supp. at 231. This was a neat circumvention of the anti-injunction statute, but one that Congress did not appreciate.

[11]Act of August 30, 1935, ch. 829, § 405, 49 Stat. 1027.

[12]S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).

Cir. 1962), and *Tomlinson v. Smith*, 128 F.2d 808 (7th. Cir 1942). We believe that to be a correct interpretation, one soundly based on the history of the exception and on the paradoxicalness of authorizing injunctive relief while depriving courts the authority to declare the rights of the parties in connection with the injunctive relief. The breadth of the tax exception of § 2201 is co-extensive with the effect of § 7421 (a), and so the applicability of the latter to our situation is determinative of jurisdiction.

2. *Individual Appellants*

The springboard of the action before us—namely that the removal of Americans United from the status of those corporations to whom tax deductible contributions can be made has wreaked havoc upon its financial stature—is the same for both the individual and corporate appellants. They seek to keep Americans United afloat. However, the posture of the appellants and the effect that the relief sought would have upon them is distinctively different. Stripped to its barest essentials, the individual appellants' relief relates directly to the assessment and collection of taxes. They seek, despite their averments that no taxes have been assessed and that this is a civil rights rather than tax case, to enjoin the appellee from assessing or collecting taxes on those dollars contributed by them to Americans United. In paragraph 3 of the relief portion of appellants' amended complaint this becomes evident:

> [Plaintiffs pray that the following relief be granted:] Judgment enjoining defendant Thrower from enforcing Sections 170(c) and 501(c)(3) of Title 26 U.S.C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amedment rights by reason of the unconstitutionality of those sections.

The allegations that the tax will be assessed and collected in violation of their constitutional rights is to no avail. *See Dodge v. Osborn*, 240 U.S. 118 (1916); *Harvey v. Early*, 160

F.2d 836 (4th Cir. 1947); *Moon v. Freeman*, 245 F. Supp. 837 (E.D. Wash. 1965); *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The allegation that no tax has yet been assessed, and that therefore the action is somehow without § 7421(a), we find to be equally without merit. In the words of Chief Judge Sirica in *National Council, supra*, 224 F.Supp. at 314, "[t]he Court cannot agree that the immunity of a tax assessment from court-imposed restraint has anything to do with the timing of that restraint." Finally, the individual appellants have not shown the high probability of success on the merits that warrants the non-application of § 7421(a) under the standards enunciated in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

> [I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case [*Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932)], the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." *Id.*, at 509.
>
> We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim may the suit for an injunction be maintained.

The action brought and the relief sought by the individual appellants directly ranges within the ambit of § 7421(a), and as to them the action of the district court in dismissing the case was correct.

3. *Corporate Appellant*

Americans United, at the present time exempt from taxation on income by virtue of 26 U.S.C. § 501(c)(4) (1970),

does not seek in this lawsuit to enjoin the assessment or collection of its own taxes. Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the *Cumulative List, Organizations Described in Section* 170(*c*) *of the Internal Revenue Code of* 1954 is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. Appellant, therefore, presented with the dollar dilemma of finding prospective contributors closing their wallets, seeks to have the court restrain the Commissioner from meting § 501(c)(3) and § 170(c) qualifications in the alleged unconstitutional manner. A necessary side effect of any relief, of course, will be to allow contributions which otherwise would be made with after tax dollars to become deductible. Consequently, the appellee alleges that this is in essence a suit to restrain the assessment or collection of a tax and barred by § 7421(a).

McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972), involved a class action brought by a black American denied membership in an Elks Lodge because of his race. The plaintiff sought to enjoin the Secretary of Treasury from granting tax benefits to fraternal and nonprofit organizations which excluded nonwhites from membership. The statutes involved were similar to those in the case before us, granting various exemptions both to the organizations and their contributors. The plaintiff alleged that the statutes were either unconstitutional, unconstitutionally interpreted, or that the benefits granted thereby were in violation of Title VI of the Civil Rights Act of 1964. The defendant moved to dismiss citing §§ 2201 and 7421(a), but a three-judge district court denied the motion. Chief Judge Bazelon, writing for the court stated:

> Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount

> of his own tax, nor does be seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable." In the present case, the central purpose is clearly inapplicable. It follows that neither § 7421(a) nor the exception to the Declaratory Judgment Act prohibits his suit.

Id. at 453-54 (footnotes omitted).

A case from the opposite side of the restraint coin, wherein the Commissioner threatened to remove the tax exempt status of an organization because of racially discriminatory policies, is *Bob Jones University v. Connally*, 341 F.Supp. 277 (D.S.C. 1971). Fearing that a drop in its level of contributions would cause irreparable harm, the University sought a preliminary injunction restraining the Commissioner from removing its § 501(c)(3) qualification. Faced with identical §§ 2201 and 7421(a) arguments, the district judge granted the injunction. The court found that the gravamen of the plaintiff's complaint was not to ask the court to substitute its views for that of the Commissioner, *see Jolles Foundation, Inc. v. Moysey*, 250 F.2d 166 (2d Cir. 1957), but rather to prevent the Commissioner from acting "beyond the authority granted by the constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress." 341 F.Supp. at 282-83. The court went on to state:

> If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the ap-

> plicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal office which it would be powerless to do . . . . Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.
>
> Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm . . . .

Id. at 283.

Here, as in *Bob Jones*, the essence of appellants' attack is not against the applicability of a test or their ability to qualify under presently existing standards. As the appellee correctly points out in his brief, "[appellants] do not seriously contend that Americans United qualifies under Section 501(c) (3) as written. Rather, they contend that the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional, and they seek a declaratory judgment to that effect."

Appellee principally relies upon *Jolles Foundations, Inc. v. Moysey, supra.* Although there is language in *Jolles* regarding § 2201 we believe it to be distinguishable and not persuasive. In *Jolles* the appellant alleged that the Commissioner erred in his determination of its tax exempt qualification, and brought an action which the court correctly viewed as in the nature of mandamus "against the Commissioner to compel him to reverse his position based upon the activities of the Foundation

already held not to come within the exception . . . ." 250 F.2d at 169. We submit that the *Jolles* case did not involve the alleged unconstitutionality of a taxing statute, but a challenge respecting the judgment of the Commissioner, and manifestly "the court cannot presume to speak for the Commissioner or take over his duty to pass upon the tax status of organizations applying for exemption." *Id.*

Here, as in *McGlotten* and *Bob Jones*, no tax has been or will be assessed against the corporate appellant. The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation. The corporation, alleging constitutional violations of an identical nature to that of the individual appellants, irreparable injury, and an inadequate legal remedy,[13] does so in a posture removed from a restraint on assessment or collection. We find, as did the courts in *Bob Jones*, *McGlotten*, and im-

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[13]Since Americans United qualifies as a tax exempt organization pursuant to §501(c)(4) of the Code, the normal avenue of challenge, tax refund litigation, is not available. Appellee in his Supplemental Memorandum and at oral presentation for the first time suggested two additional "adequate" legal remedies available to the appellant corporation. These are the federal social security and unemployment tax refund litigations, since § 501(c)(3) organizations are exempt from both taxes while § 501 (c)(4) organizations are exempt from neither.

Appellant points out that although not required to pay social security taxes while exempt under § 501(c)(3), it elected to do so. A termination of such an election requires two years advance notice and cannot be made if the election has been in effect more than eight years, as it was here. Moreover, under 26 U.S.C. § 3121(k)(3) (1970), an organization which once terminates its election to pay those taxes voluntarily cannot renew the election. Although the unemployment tax refund litigation is not fraught with perils of equal magnitude, it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action, and relief sought as to hardly be considered adequate.

pliedly the court in *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), on permanent injunction, 330 F.Supp. 1150 (D.D.C. 1971), *aff'd per curiam*, 404 U.S. 997 (1971),[14] that it would be an all too encompassing interpretation of § 7421(a) to consider it as precluding a suit of this nature, and refuse to so hold.[15]

We do not adopt the doctrine that § 7421(a) is inapplicable so long as a party does not seek to restrain the collection or

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[14]*Green* involved a class action brought by black students and their parents to enjoin the Secretary of Treasury from granting tax exempt status to private schools discriminating against blacks. A three-judge district court was convened and, Judge Leventhal writing, determined that the Internal Revenue Code could not be interpreted as granting a tax exempt status to such organizations. Although faced with governmental insistence that the relief sought was barred by §§ 2201 and 7421(a), the court did not address the problem but granted the injunctive relief. The case was affirmed *per curiam* and without opinion by the Supreme Court, but as by that time the Commissioner had "voluntarily" altered the rules to comply with the decision, and the government did not press the appeal, the precise force and effect of the affirmance is questionable.

[15]The ultimate effect of the *Green* and *McGlotten* litigations was to increase the tax revenue of the United States, while at least theoretically the effect of *Bob Jones* and the case at hand is to decrease the tax revenue. We do not believe, and appellee has in fact agreed, that such a fact is of distinguishable merit. It is untenable that a party seeking to have an entire section declared unconstitutional, thus removing the exemption and theoretically increasing the tax revenue, should be treated differently from one seeking to remedy the discriminatory underinclusion by striking the unconstitutional clause, and thus theoretically decreasing the tax revenue.

In reaching our conclusion regarding the applicability of § 7421(a) we have considered, and found unpersuasive, the decisions in Liberty Amendment Committee of the U.S.A. v. United States, Civ. No. 70-721-HP (C.D. Cal June 19, 1970), *aff'd per curiam*, No. 26,507 (9th Cir. July 7, 1972), and Crenshaw County Private School Foundation v. Connally, 343 F.Supp. 495 (M.D. Ala. 1972).

assessment of its own taxes. Our holding is much narrower. In those situations where a non-taxpayer sues in the stead of the taxpayer,[16] *e.g.*, the shareholder suits brought on behalf of a reluctant corporation, *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 464 (1903), *cf., Helvering v. Davis*, 301 U.S. 619, 639-40 (1937), or where the tax itself directly operates to place a financial burden upon the taxpayer, *e.g.*, where the valuation of an estate for estate tax purposes would affect the tax liability of a non-taxpayer at a future date, *West Chester Feed & Supply Co. v. Erwin*, 438 F.2d 929 (6th Cir. 1971), when a tax levied upon processing oil would directly affect one about to enter the processing business, *Gardner v. Helvering*, 88 F.2d 746 (D.C. Cir. 1936), *cert denied*, 301 U.S. 684 (1937), *au fond* it is a suit to restrain the collection or assessment of a tax "indirectly" levied upon the plaintiff, and within the purpose and proscription of § 7421(a).

What we have then is a hybird sort of fellow. The challenge upon which we reverse runs not to the exercise of discretion or the everyday working affairs of the Commission, something we feel history and good sense implore us to leave alone, nor is it concerned with taxes levied either directly or "indirectly" upon the corporate appellant, something which § 7421(a) mandates us to leave alone.[17] Finally, an alternate

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[16]Arguably Americans United's purpose could be that of "representing" its remaining contributors who now face the assessment of taxes on their contributed dollars—a sort of "end run" maneuver to avoid the proscriptions of § 7421(a) that we have found to apply to suits brought by those contributors—but we do not believe such to be a realistic appraisal of the situation. Americans United is concerned about its own preservation which is threatened not by the indirect burden of the tax upon them, but by the "unconstitutional" action of the Commissioner resulting in the driving of prospective contributors to other "charities."

[17]Standing to sue and ripeness problems, neither of which we find to preclude the lawsuit before us, could also work to prevent other litigation which arguably would be without the scope of §§ 2201 and 7421(a).

legal remedy in the form of adequate refund litigation is unavailable. The lack of a meaningful alternate form of relief is important herein for two reasons: first, its absence solidifies our belief that the situation *sub judice* is without the purpose and expected scope of § 7421(a), and second, its absence renders equitable relief most appropriate. We suspect that the birthrate of such a hybird will be so low that the proverbial "flood gates" to judicial review of Internal Revenue Service action will remain closed.

4. *Sovereign Immunity*

Appellee, relying chiefly upon *Louisiana v. McAdoo*, 234 U.S. 627 (1914), urges the court to recognize this suit as one against the United States to which consent has not been given, and hence barred by the doctrine of sovereign immunity. We feel that the appellee has failed to recognize this suit as rightly falling within the exceptions to the doctrine as reiterated by the Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 622 (1963). Those exceptions relate to (1) actions by officers beyond their statutory powers, and (2) actions within the scope of their authority, when the powers themselves or the manner in which they are exercised are constitutionally void. The appellants do not challenge the right of the Commissioner to adopt rules and regulations, but they do challenge his right to enforce a statute which they assert violates various constitutional liberties. This clearly falls within the "exception" almost as broad as the "rule," that "sovereign immunity does not prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution."[18]

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[18]K. Davis, Administrative Law Treatise 522 (1958). Professor Davis treats Ex Parte Young, 209 U.S. 123 (1908) as the "foundation case" for such a rule:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case

III. SUBSTANTIAL CONSTITUTIONAL QUESTION

The single district court judge below denied appellants' motion to convene a three-judge panel pursuant to 28 U.S.C. § 2282 (1970), for the stated reason that the challenge raised no substantial constitutional questions. We reverse and remand with respect to the only remaining appellant in this litigation, Americans United, with instructions to promptly convene a § 2282 panel.

In *Bulluck v. Washington*, No. 24,862 (D.C. Cir. Jan. 19, 1972), *rehearing en banc*, May 31, 1972, we have recently had an opportunity to restate the scope of a district court's inquiry (and consequently our scope of review) when confronted with an application for a § 2282 panel. The court is limited to questioning (1) whether the constitutional questions raised are substantial, which in turn is limited to a determination of whether they are "obviously without merit" or so clearly unsound by reason of previous decisions of the Supreme Court "as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933); (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case presented otherwise comes within the requirements of the three-judge panel. *Idlewild Bon Voyage Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

As our discussion of the case to this point has shown, what appellant effectively seeks here is a restraint on the enforcement of the "substantial part" clause of § 501 (c) (3). It accomplishes this by seeking a declaratory judgment that the section is unconstitutional, and by requesting injunctive relief to force the Commissioner to reclassify it and other similarly sit-

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stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id, at 159-160. *See also* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304-05 (1952).

uated corporations as tax exempt if they are found to qualify. This type of action, affecting legislation of broad regulatory scope and amounting to a restraint on its enforcement as written and interpreted, is within the § 2282 mandate. Satisfied that the other requirements for the three-judge panel are present, and that equitable relief is properly requested, we turn to the substantiality question.

Although as can be seen from our earlier listing[19] appellants originally raised a multitude of possible constitutional violations, at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the "discriminatory" aspects of § 501 (c) (3). Basically, this is that since larger, wealthier organizations can engage in conduct identical to that of appellant without, because of their size, falling within the "substantial part" category of § 501 (c) (3) and thereby losing their precious tax exempt status (and more precious listing among those corporations to whom tax free contributions can be made), § 501 (c) (3) is unconstitutionally discriminatory in violation of the equal protection ramifications of the due process clause of the fifth amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).[20] We find such a claim, novel as it may be, neither obviously without merit nor foreclosed by previous Supreme Court decisions.

Appellee relies chiefly upon *Cammarano v. United States*, 358 U.S. 498 (1959), but *Cammarano*, while disposing of appellants' claim that first amendment right are violated by the

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[19]*See* pp. 4-5, *supra*.

[20]It is true that in Helvering v. Lerner Stores Co., 314 U.S. 463, 468 (1941), Justice Douglas wrote that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." The great weight of authority today, however, as exemplified by *Bolling*, *Schneider v. Rush*, 377 U.S. 163 (1964), and *Shapiro v. Thompson*, 394 U.S. 618 (1969), is that "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " 377 U.S. at 168.

questioned statute, does not attempt to deal with possible discriminatory conduct. In *Cammarano* liquor dealers had expended funds in advertising campaigns against statutory resolutions in Washington and Arkansas which would have effectively closed their businesses, and sought to deduct their costs as ordinary business expenses. The lower courts ruled that "the payments . . . were 'expended for . . . the . . . defeat of legislation' within the meaning of Treas. Reg. 111, § 29.23(0)-1 and were therefore not deductible as ordinary and necessary business expenses under § 23(a) (1) (A) of the Internal Revenue Code of 1939." *Id.* at 501. The court, per Chief Justice Warren, continued:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

Id. at 513. Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. This discrimination relates solely to the "size" of the organization, which appellants allege is directly related to its wealth and power structure, and comes into play during and because of the exercise of first amendment protected liberties. By allowing larger, richer organizations more "dollar punch" in terms of "propagandizing" and "influencing legislation" before their respective activities are considered "substantial," the Commissioner is accused of following the mandate of § 501 (c) (3) and treating identical activity differently, solely on the basis of the size, or wealth, of the acting party.

Nearly every jurist and attorney today is aware of the flood of cases before the bench raising important questions, at least in the context of the fourteenth amendment equal pro-

tection clause, concerning the interpretation of "fundamental rights," "suspect categories," and their resultant "compelling state interest test." A case similar to the redoubtable *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), which struck down California's system of public school financing as violative of the fourteenth amendment, and straightforwardly classified both "wealth" and "education" as categories calling for stricter justification in terms of equal protection, is presently submitted before the United States Supreme Court. *San Antonio Independent School District v. Rodriguez*, No. 71-1332 (argued 10/12/71, 41 U.S.L.W. 3197). The Court's decision in that case should prove most instructive in an area of concern before us—" "discrimination" of this type as within the "wealth" category, and the status of "wealth" as giving rise to the compelling interest test.

If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment,[21] and raises questions concerning the directness of its relationship to wealth. We are aware that the various tests of which we speak have arisen in the context of the fourteenth amendment, but find that they are nonetheless relevant to the consideration of whether the government has exercised its taxing powers in such a discriminatory fashion as to violate the due process guaranties of the fifth amendment. This is neither

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[21] *See* dissent of Marshall, J., in California v. LaRue, 41 U.S.L.W. 4039, 4048 (December 5, 1972), for discussion of classifications based on speech. *See also* Speiser v. Randall, 357 U.S. 513 (1958), a case which although decided on procedural due process grounds discussed the effect of tax exemptions:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

Id. at 518.

a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

We want to stress that our opinion is in no way meant to state our views of the merits of this case beyond that required: namely, that the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421 (a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion. The discrimination problem may ultimately prove to be a mirage, or even a muddle, but it certainly is not maggot-pated. The question merits a three-judge panel.

Reversed and remanded for further proceedings consistent with this opinion.

Wilkey, *Circuit Judge*, concurring: I concur unreservedly in Judge Tamm's opinion for the court, all the more willingly because his opinion is a model of lucidity in a field of law — taxation — in which that quality is as rarely found in either judicial decisions or legislation as sunlight on the dark side of the moon.

Since we have decided no issue on the merits, except that the constitutional issues are sufficiently serious to require decision by a three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court which was not briefed by the parties and is not dealt with by our court's opinion.

As I see it, the basis of our decision here is that there is a substantial constitutional question because the challenged tax provision discriminates on the basis of wealth (size), and because the Supreme Court is currently considering cases which may say that such distinctions need to be closely analyzed. Although other statutes are relevant, the vital statute at issue is 26 U.S.C. § 501 (c) (3) (1970), quoted in footnote one of the court's opinion. Making a careful analysis of this statute, the

first part states why tax exemption is granted – and that relates to the *purpose* of the organization. Thereafter are listed several factors which will nullify the tax-exempt status granted by the first part of § 501(c)(3). One of the *dis*qualifications for tax-exempt status is expressed in the phrase, ". . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . ."

And this disqualification phrase is what this case is all about. 26 U.S.C. § 501 (c) (3) *first* ties tax status to the *purpose* of the organization–and the "no substantial . . . influence legislation" disqualification test (like the disqualification reference to private earnings or political campaigns) *is aimed at assuring some purity in that purpose.*

It is arguable that a small organization that spends almost all of its funds lobbying is not organized or conducted for the same purpose as a large organization, which may spend quantitatively as much, but which proportionately devotes most of its activities to unquestionably exempt purposes. If we make an analysis by following the impact of the donor's dollar, a gift to "Americans United" has "more punch" on the legislative front than a gift to a large church organization which spends only 1% of its income on lobbying activities.

In that sense, the large organization is not engaged in what can reasonably be called "identical conduct." The statute does not give any greater privilege of speech to large organizations–other than the greater amount of impact any group can have if it raises more money. Rather, the interpretation of equal protection sought by "Americans United" would give a greater right of speech–by emasculating the "purpose" rationale of § 501 (c) (3) – to small organizations. We cannot ignore the "purpose" rationale, because *purpose* is the *only* ground for tax exemption under § 501 (c) (3).

Furthermore, if the larger groups are seen as engaged in "identical conduct"–what is to be the bench mark? If the purpose of the tax statute is to be preserved at all, then the large church organizations probably must hold to devoting a small percentage of their resources to lobbying. Is that *quantitative*

amount then to guide—so that a small organization, with total funds amounting only to the tiny percentage which the large organization devotes to this purpose, could devote 100% of its funds to lobbying and still be exempt?

In short, it is certainly arguable that small groups are not being treated differently by § 501 (c) (3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation.

I have raised the issue above by stating only one side of the argument. There are, of course, counterarguments.[1] We are not here deciding this or any other issue on the merits, but since neither party has seen fit to bring this issue to the courts' attention, I feel it of sufficient importance to raise it for such consideration as the three-judge court and parties may wish to give it.

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[1]Some counterarguments may be derived from William G. Halby's article, "Is the Income Tax Unconstitutionally Discriminatory?", 58 A.B.A.J. 1291 (December, 1972). Others may be inspired by the reflection that, if 200 years ago men revolted on the principle that "Taxation without representation is tyranny", then today men may rise in righteous wrath because taxation with representation but beyond human comprehension is even worse.